



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
RESEARCH TRIANGLE PARK, NC 27711

JUN 21 1995

OFFICE OF
AIR QUALITY PLANNING
AND STANDARDS

Mr. Richard Collins
Occidental Chemical Corporation
Niagara Durez Plant
5000 Packard Road
Niagara Falls, New York 14032

Dear Mr. Collins:

This letter is to confirm a visit by a representative of the U.S. Environmental Protection Agency (EPA) to your Phenolic Resin facility in Niagara Falls, New York, on Monday, July 10. This visit was arranged during recent phone conversations with Peter Hofmann of my staff. There is a possibility that representatives from the New York Department of Environmental Conservation might also attend. If there are to be additional attendees, you will be notified and provided their names.

As you know, EPA is required to develop air emission standards for all major sources, and selected area sources, that emit any of the 189 Hazardous Air Pollutants (HAPs) identified in Section 112(b) of the Clean Air Act (42 USC 7414). We are currently studying the formaldehyde-based resin manufacturing industry in order to develop a technology-based emission standard. To help us in our research efforts, we would like to discuss the following types of information during the site visit:

1. Brief description of your process
 - a. block diagram of facility
 - b. feedstocks used
 - c. production capacities
 2. Description of emission points
 - a. storage emissions
 - b. process vents
 - c. equipment leaks
 - d. waste water emissions
 3. Current/planned controls for emission points
 4. Current monitoring activities
 5. Tour of facility
 6. Concerns or questions you have for EPA
- Note: Feel free to discuss these at any point during the visit.

The authority for EPA's information gathering and source testing is included in Section 114 of the Clean Air Act. Enclosure 1 contains a summary of this authority. If you believe that disclosure of specific information we request during or subsequent to the visit would reveal a trade secret, you should clearly identify such information as discussed in the enclosure. Any information subsequently determined to constitute a trade secret will be protected under 18 USC 1905. If no claim of confidentiality accompanies the information when it is received by EPA, it may be made available to the public by EPA without further notice (40 CFR Part 2.203, September 1, 1976). All emission data, however, will be made available to the public.

Enclosure 2 summarizes Agency and Emission Standards Division policies and procedures for handling privileged information and describes the EPA contractor commitments and procedures for use of confidential materials. It is EPA's policy that compliance by an authorized representative with the requirements detailed in Enclosure 2 provides sufficient protection for the rights of submitters of privileged information.

The following policies concerning liability should also be of interest to you:

1. If a Federal employee is injured in the course of his employment, compensation coverage is provided by the Government under the Federal Employees Compensation Act (5 USC 8108 et seq.); and

2. If, due to the employee's negligence, property damage or personal injury to third parties occurs, the Federal Tort Claim Act (28 USC 1346) provides a means of fixing any liability upon the Federal Government.

EPA's Office of General Counsel has informed the Agency that a firm may not condition EPA's "right to entry" upon consent to a waiver of liability and has instructed employees not to sign such waivers. If you have any questions regarding this refusal, please contact Donnell L. Natkes, Office of General Counsel, at (202) 382-5460.

If you have any questions regarding this site visit, please don't hesitate to contact Mr. Hofmann at (919) 541-3713.

Sincerely,



Susan R. Wyatt, Group Leader
Organic Chemicals Group
Emission Standards Division

Enclosures

ENCLOSURE 1

EPA's Information Gathering Authority
Under Section 114 of the Clean Air Act

Under Section 114 of the Act (42 U.S.C. 7414), Congress has given the U. S. Environmental Protection Agency broad authority to secure information needed "(a) for the purpose (i) of developing or assisting in the development of any implementation plan under Section 110 or 111(d), any standard of performance under Section 111, or any emission standard under Section 112 (ii) of determining whether any person is in violation of any such standard or any requirement of such a plan, or (iii) carrying out any provision of this Act." Among other things, Section 114 authorizes EPA to make inspections, conduct tests, examine records, and require owners or operators of emission sources to submit information reasonably required for the purpose of developing such standards. In addition, the EPA Office of General Counsel has interpreted Section 114 to include authority to photograph or require submission of photographs of pertinent equipment, emissions, or both.

Under Section 114, EPA is empowered to obtain information described by that section even if you consider it to be confidential. You may, however, request that EPA treat such information as confidential. Information obtained under Section 114 and covered by such a request will ordinarily be released to the public only if EPA determines that the information is not entitled to confidential treatment.* Procedures to be used for making confidentiality determinations, substantive criteria to be used in such determinations, and special rules governing information obtained under Section 114 are set forth in 40 CFR Part 2 published in the Federal Register on September 1, 1976 (40 FR 36902).

*Section 114 requires public availability of all emission data and authorizes disclosure of confidential information in certain circumstances. See 40 FR 36902 - 36912 (September 1, 1976).

Pursuant to §2.204(a) of EPA's Freedom of Information Act (FOIA) regulation, in the event a request is received, or it is determined that a request is likely to be received, or EPA desires to determine whether business information in its possession is entitled to confidential treatment even though no request for release of the information has been received, please be advised that EPA will seek, at that time, the following information to support your claim as required by §2.204(e)(4) of EPA's FOIA regulations:

1. Measures taken by your company to guard against undesired disclosure of the information to others;
2. The extent to which the information has been disclosed to others, and the precautions taken in connection therewith;
3. Pertinent confidentiality determinations, if any, by EPA or other Federal agencies, and a copy of any such determinations, or reference to it, if available; and
4. Whether your company asserts that disclosure of the information would be likely to result in substantial harmful effects on the business' competitive position, and if so, what those harmful effects would be, why they should be viewed as substantial, and an explanation of the causal relationship between disclosure and such harmful effects.

ENCLOSURE 2

U.S. Environmental Protection Agency
Office of Air Quality Planning and Standards (OAQPS)
Emission Standards Division (ESD)

January 1989

Summary of ESD/OAQPS
Procedures for Safeguarding Confidential Business Information (CBI)

1. Purpose

This memorandum describes Agency policy and procedures pertaining to the handling and safeguarding of information that may be entitled to confidential treatment for reasons of business confidentiality by the ESD, OAQPS, Office of Air and Radiation, U.S. Environmental Protection Agency.

2. Other Applicable Documents:

- a. Clean Air Act as amended.
- b. 40 CFR, Chapter 1, Part 2, Subpart 8 - Confidentiality of Business Information.
- c. EPA Security Manual, Part II, Chapters 8 and 9.
- d. Clean Air Act Confidential Business Information Security Manual for Federal Employees.
- e. Clean Air Act Confidential Business Information Security Manual for Contractors.

3. Exception:

This document was prepared as a summary of data gathering and handling procedures used by the ESD, OAQPS, EPA. Nothing in this document shall be construed as superseding or being in conflict with any applicable regulations, statutes, or policies to which EPA is subject.

4. Definition:

Confidential Business Information - Information claimed by the provider to be confidential. This information may be identified with such titles as trade secret, secret, administrative secret, company secret, secret proprietary, privileged, administrative confidential, company confidential, confidential proprietary, or proprietary. NOTE: These markings should not be confused with the classification markings of National Security information identified in Executive Order 11652.

5. Background

Section 114(c) of the Clean Air Act as amended reads as follows:

"Any records, reports, or information obtained under subsection (a) shall be available to the public, except that upon a showing satisfactory to the Administrator by any person that records, reports, or information, or particular part thereof, (other than emission data) to which the Administrator has access under this section if made public, would divulge methods or processes entitled to protection as trade secrets of such person, the Administrator shall consider such record, report, or information or particular portion thereof confidential in accordance with the purposes of Section 1905 of Title 18 of the United States Code, except that such record, report, or information may be disclosed to other officers, employees, or authorized representatives of the United States concerned with carrying out this Act or when relevant in any proceeding under this Act."

The treatment of CBI by the U.S. EPA, including data obtained under Section 114 of the Clean Air Act, is governed by Title 40, Part 2, of the Code of Federal Regulations. These regulations require EPA offices to include a notice with each request for information to inform the business of: (1) its right to assert a claim of confidentiality covering part or all of the information, (2) the method for asserting a claim, and (3) the effect of failure to assert a claim at time of submission. In addition, the regulations: (1) set forth procedures for the safeguarding of confidential information; (2) contain provisions for providing confidential information to authorized representatives; (3) contain provisions for the release of information to the Congress, Comptroller General, other Federal agencies, State and local governments, and Courts; (4) permit the disclosure of information within EPA to employees with an official need for the information; and (5) prohibit wrongful use of such information and cite penalties for wrongful disclosure. Further, the regulations contain the Agency's basic rule concerning the treatment of requests for information under the Freedom of Information Act (5 U.S.C. 552).

6. Procedures:

a. Requests for Information

Each request originating in the ESD for information made under the provisions of Section 114(a) is signed by the Division Director. The request includes ESD's standard enclosure "EPA's Information Gathering Authority Under Section 114 of the Clean Air Act," which was designed to meet the requirement of 40 CFR Part 2 discussed above.

b. Receipt of Confidential Business Information

Upon receipt of information for which confidential treatment has been requested, the Office of the Director (OD) directs the logging of the material and the establishment of a permanent file. If confidential treatment is requested, but is not specifically marked, the material will be stamped "Subject to Confidentiality Claim." If part of the material is claimed to be confidential, that portion is marked "Subject to Confidentiality Claim." In compliance with Sections 2.204 and 2.208 of 40 CFR Part 2, the Branch Chief responsible for the requested information reviews the information to determine whether it is likely to be confidential in contrast to being available in the open literature, whether it is emission data, and whether it likely provides its holder with a competitive advantage. If the information is clearly not confidential, the Branch Chief prepares a letter for signature of the Division Director, ESD, to notify the business of this finding. If the information is possibly confidential, the Branch Chief sends a memorandum to inform the OD, ESD, of this finding, gives a brief description of the material (what it is, how many pages, etc.), identifies it with the correct ESD project number, and lists those persons who are authorized to have access to the information. The information and memorandum are hand carried to the OD and placed in the CBI files with the material. A record of who will see the information (Attachment A) is also filed with the folder containing the information. If CBI is received from the owner via an authorized representative or a third party, the same procedure is followed, with the addition of clearly identifying the information and its source. By regulation, information for which confidential treatment is requested must be so marked or designated by the submitter. The EPA takes additional measures to ensure that the proprietary designation is uniformly indicated and immediately observable. All unmarked or undesignated information (except as noted below) is freely releasable.

c. Storage of Confidential Business Information

Folders, documents, or material containing CBI (as defined) shall be secured, at a minimum, in a combination-locked cabinet. Normal ESD procedure is to secure this information in a cabinet equipped with a security bar and locked using a four-way, changeable combination padlock. In addition, the entrance door to the CBI storage room is equipped with a changeable combination simplex lock. The locked files are under the control of the OD.

Knowledge of the combinations of the locking devices is limited to the Document Control Officer (DCO) and the minimum number of persons required to effectively maintain normal business operations. Records of the locking device combination are stored elsewhere in conformance with the requirements of the EPA Security Manual.

Combinations of the locks are normally changed whenever a person with knowledge of the combinations is transferred, terminates employment, no longer authorized access, or whenever the possibility exists that the combinations may have been subject to compromise.

Files may be checked out upon confirmation that the requesting person is authorized to receive the information. All confidential files must be returned no later than 4:00 p.m. on the same day they are removed. The intended user must sign the CBI Control Record when the file is checked out.

The individual who signs out a confidential file is responsible for its safekeeping. The file must not be left unattended. The information must not be disclosed to any non-authorized personnel.

Storage procedures for CBI by an authorized representative of EPA (see Section d. below) must be, at a minimum, as secure as those established for EPA offices within OAQPS. Whenever CBI is removed from the EPA files to be transmitted to an authorized representative, a memorandum is placed in the file indicating what information was transmitted, the date, and the recipient. The authorized representative returns a signed receipt to the DCO.

d. Access to Confidential Business Information

Only authorized EPA employees may open and distribute CBI.

Only employees who require and are authorized access to CBI in the performance of their official duties are permitted to review documents and, upon receiving a confidential document, must sign and date the form shown in Attachment A to certify their access to the document.

The CBI files are controlled by the OD, ESD, and maintained by a contractor cleared for access as an authorized representative. Access to the information is limited to those persons having a need to know in performing their official duties.

The ESD Branch having primary interest in the CBI provides a memorandum for the record designating those personnel who are authorized to use CBI in a program under which CBI can be requested. No person is automatically entitled to access based solely on grade, position, or security clearance. The names of persons granted access to CBI are placed on the Clean Air Act CBI access list, which indicates the specific CBI each person is permitted to see. The access list is reviewed and updated periodically.

Companies under contract to perform work for EPA may be designated authorized representatives of EPA if such designation is necessary in order for the contractor to carry out the work required by the contract. As authorized representatives,

contractors may be granted access to CBI by the Director, ESD. The following conditions apply when it has been determined that disclosure is necessary:

(1) the contractor designated as a representative and its employees (a) may use such confidential information only for the purpose of carrying out the work required, (b) must refrain from disclosing the information to anyone other than EPA without having received from EPA prior written approval of each affected business or of an EPA legal office, and (c) must return to EPA all copies of the information (and any abstracts or excerpts therefrom) upon request or whenever the information is no longer required for the performance of the work.

(2) The authorized contractor designated as a representative must obtain a written agreement from each of its employees who will have access to the information. A copy of each employee agreement (Attachment B) must be furnished to EPA before access is permitted.

(3) The contractor designated as an authorized representative must agree that the conditions in the contract concerning the use and disclosure of CBI are included for the benefit of, and shall be enforceable by, both EPA and any affected business having a proprietary interest in the information.

Information may be released to or accessed by EPA employees other than OAQPS employees only upon approval of the Director, ESD.

Requests for CBI from other Federal agencies, Congress, the Comptroller General, Courts, etc., are processed by the OD, ESD, in accordance with 40 CFR 2, Subpart B.

Requests under the Freedom of Information Act are handled in accordance with 40 CFR 2, Subpart A. The ESD Freedom of Information Coordinator must be consulted prior to responding to any request for information if a claim of confidentiality has been asserted or if there is reason to believe that a claim might be made if the business knew release was intended.

e. Use and Disclosure of Confidential Business Information

The CBI as defined may not be used in publications, supporting documents, memoranda, etc., that become a part of the public domain, except as provided for in 40 CFR 2 Subpart B.

The CBI may not be summarized without the approval of the Project Manager responsible for the CBI. Any authorized reproduction shall be provided by the CBI office staff. Further, all authorized reproductions must be introduced into the CBI control system and treated according to the same procedures applicable to the original confidential material.

The EPA generated documents or material, or extracts of information containing CBI, must be stamped "Subject to Confidentiality Claim" and a cover sheet must be attached to identify the material as CBI.